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March 29, 2004

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MAR 29 2004

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: MM Docket No. 04-19
RM-10845
Talladega and Munford, Alabama

Dear Madame:

Enclosed for filing in the above-referenced docket, pursuant to Sections 1.415 and 1.420 of the Commission's rules, are an original and four copies of Comments submitted by Calhoun Communications.

Should there be any questions, please contact the undersigned counsel.

Sincerely,



Howard M. Weiss

HMW/et

Enclosure(s)

cc: Cary S. Tepper, Esquire
Booth, Freret, Imlay & Tepper, P.C.

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BEFORE THE

Federal Communications Commission

WASHINGTON, DC 20554

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MAR 29 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
Amendment of Section 73.202(b))
Table of Allotments,) MM Docket No. 04-19
FM Broadcast Stations) RM – 10845
(Talladega and Munford, Alabama))

COMMENTS OF CALHOUN COMMUNICATIONS

Calhoun Communications (“CC”), by its counsel, hereby respectfully submits Comments in response to the Notice of Proposed Rulemaking (“NPRM”) in the above-referenced rulemaking. The NPRM set a deadline of March 29, 2004 for comments, so these Comments are timely filed. In support hereof, CC states as follows:

I. Background

1. Jacobs Broadcast Group, Inc. (“Jacobs”) filed the petition for rulemaking initiating this proceeding on June 6, 2003. Jacobs proposes to amend the Table of Allotments to substitute Munford, Alabama (2000 Census population 2,446) for Talladega, Alabama (2000 Census population 15,143) as the community of license for Jacobs’ Station WTDR-FM on Channel 224A. Jacobs acknowledges that the proposed community switch would leave Talladega, county seat of Talladega County, with no FM service and only one AM local service.¹ Moreover, Jacobs concedes that the proposed allocation would be short-spaced to Station WAFN(FM), Arab, Alabama, requiring a waiver of Section 73.207 of the rules.

¹ Station WSSY-FM, presently licensed to Talladega, has been moved to Goodwater, Alabama, a town of less than 2,000 persons. (See MM Docket No. 01-104.) Stripped of its two local FM outlets, Talladega would be served only by Station WNUZ(AM), a 1 Kw standard broadcast station.

2. Jacobs justifies this reallocation on the grounds that Munford is an independent community with its own city government and other alleged attributes of community stature, such as CDP status. Jacobs also explicitly requests that the allocation coordinates should be those of its current licensed site near Talladega. Jacobs states: "...[T]his request does not propose the relocation of WTDR...." (See Technical Exhibit at ¶6.) Accordingly, Jacobs asserts that "the grandfathered short spacing to WAFN remains unchanged with this proposal."

3. On February 6, 2004, the Audio Division ("AD") released a Notice of Proposed Rulemaking (the "Notice") proposing adoption of Jacobs' community switch. The AD tentatively concludes that Jacobs' proposal will result in a preferential arrangement of allocations and is consistent with Section 1.420(i) of the rules. It relies on its understanding that "Petitioner's reallocation proposal does not involve a transmitter site change...." Curiously, the AD states that Channel 224A can be allotted to Munford at WTDR-FM's licensed coordinates "[c]onsistent with the technical requirements of the Commission's Rules" (at ¶4), omitting mention of the station's short-spaced status under Section 73.207.

4. Both the AD's Notice and Jacobs' Petition also omit mention of the crucial fact that WTDR-FM has already been authorized to move away from its licensed site toward the nearby more populous Urbanized Area of Anniston, Alabama.² (See BPH-20030414ABK; granted on September 11, 2003.) As the attached Engineering Statement of CC's consultant, John Mullaney, demonstrates, that transmitter move relocated WTDR-FM as far east as was possible as long as the station was licensed to Talladega. Thus, the pivotal representation that Jacobs is not proposing to change anything but its community of license is undermined at the outset by Jacobs' application to move two months prior to the filing of the Petition, since granted.

² Anniston has six local services -- three AM and three FM stations.

5. Moreover, as Mr. Mullaney notes, WTDR-FM's April 2003 modification application was not its first move eastward. WTDR-FM was originally licensed in 1992 at a site 10 Km west of Talladega. In August 2000, it moved 12 Km northeast of Talladega. The September 2003 construction permit moved the station an additional 2.9 miles to the east. And Munford is yet another 11 miles closer to Anniston. CC will argue below that this pattern of migration forms the context of the 1.420(i) analysis the Commission must make here.

6. We further note that Jacobs has filed no fewer than six FM translator applications to rebroadcast WTDR-FM in and around Anniston (see File Nos. BNPFT-20030825AGU, Eulaton, AL; BNPFT-20030825AGT, Oxford, AL; BNPFT-20030825AGS, Anniston, AL; BNPFT-20030312AWC, Oxford, AL; BNPFT-20030312AVV, Oxford, AL; and BNPFT-20030312AVS, Anniston, AL.) Three have already been accepted for filing as singleton applications; the other three are apparently mutually exclusive with other applications. All remain pending at this time.

II. The Commission Must Presume That Jacobs Will Modify Its Facilities To A Site At Anniston And That Presumption Requires A Tuck Showing.

7. Jacobs' proposal might constitute a preferential arrangement of allocations under Modification of FM and TV Authorizations to Specify A New Community of License ("Community of License"), 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990), only if no WTDR-FM transmitter site move is planned. If Jacobs intends truly to provide a first local service to the small, isolated community of Munford, and not to the far larger Urbanized Area of Anniston, then arguably Talladega might be forced to make do with an AM outlet. But the Anniston Urbanized Area has 75,840 persons and Anniston City has 24,276 persons (2000 Census). It is utterly incredible that Jacobs would move from a community of over 15,000 persons with no FM competitor to one of less than 3,000 persons, other than as a

“pit stop” on the way to Anniston. Jacobs’ protestations that no transmitter site change is proposed notwithstanding, the likelihood that WTDR-FM is not intending to file a modification application as soon as the Munford allocation is made is belied by WTDR-FM’s outstanding construction permit to move its site toward Anniston. It is further undermined by Jacobs’ translator applications aimed explicitly at improving WTDR-FM’s coverage in Anniston and Oxford. Indeed, attached hereto as Exhibit 2 is a copy of an excerpt from Jacobs’ Consolidated Opposition To Petition To Deny three of the translator applications, filed January 30, 2004. It contains a “Sampling of E-mail Complaints” about poor WTDR-FM reception. All are, of course, in the Anniston Urbanized Area.

8. Moreover, Mr. Mullaney states in his Exhibit that if WTDR-FM’s community of license is switched to Munford, it can move to a site at Anniston’s antenna farm on Coldwater Mountain in Anniston currently controlled by Station WVOK-FM, Oxford, Alabama. From this site, WTDR-FM would blanket Anniston and adjacent Oxford with a strong signal, while Talladega would not receive even a 70 dBu signal.

9. Moreover, there is other evidence of Jacobs’ focus on Anniston. Attached hereto as Exhibit 1 is a copy of content on WTDR-FM’s website at www.thunder927.com. Under the caption “Thunder 92.7, WTDR-FM,” the following communities are listed: “Anniston · Oxford · Talladega · Pell City · Alabama.” Similarly, on the Sales Page link on WTDR-FM’s website, Jacobs states:

“This section of our website is designed to give true ‘online’ access to any information you might need to make an informed radio buying decision in the Anniston/Oxford/Talladega, Alabama marketplace.” (Emphasis added.)

10. WTDR-FM’s website further discloses that Jacobs has built a state-of-the-art office/studio complex in Oxford, Alabama, at 1913 Barry Street, adjacent to Anniston within the

Urbanized Area. (See link to “Thunder Picture Book;” copy attached in Exhibit 1.) Thus, WTDR-FM’s entire programming and sales operations -- the “guts” of the station -- have already abandoned Talladega (and Munford, for that matter) in favor of Anniston.

11. WTDR-FM already is a market leader in Anniston. Its country music format has a large listening audience. It advertises by billboard in downtown Anniston and Oxford. The Station’s new office’s telephone listing is in the Calhoun County directory which does not include Talladega.³

12. Given this factual background, the Commission cannot put its head in the sand. Jacobs should be required as a condition to the allocation to undertake that it will not relocate its transmitter site any closer to the Anniston Urbanized Area. Further, and at the very least, Jacobs should be required to submit a showing that Munford is entitled to a first local service preference under Faye and Richard Tuck, 3 FCC Rcd 5374 (1988). These requirements are the only practical means by which the Commission can assure itself that core Section 307(B) principles are being served by the proposed community switch, and that Jacobs is not circumventing these principles and Tuck with a “two-step” end run.

13. There is recent precedent for the Tuck submission requirement under analogous circumstances. In Chillicothe and Ashville, Ohio, 18 FCC Rcd 11230 (A.D. 2003), the Commission, acting on reconsideration, required the proponent to make a Tuck submission. Ashville was not located in the Columbus, Ohio Urbanized Area and the station at issue provided only 2.7% of the Urbanized Area with a 70 dBu signal. The proponent was unwilling to promise that it would not do a “two-step” modification into the Urbanized Area after the rulemaking was completed, but nevertheless claimed a first local service preference. The Commission observed:

“In the event the licensee of Station WFCB subsequently proposes to relocate its transmitter site to a location that would serve more

³ Documentation of these allegations will be furnished by supplement hereto at a later date.

than 50% of the Columbus Urbanized Area, the procedure of first proposing only a change in community of license and subsequently proposing the relocation of the transmitter site would effectively circumvent a specific Commission requirement that the licensee submit a showing pursuant to Faye and Richard Tuck. In order to avoid any such perception, we are requesting [the proponent] to submit a showing pursuant to Faye and Richard Tuck to demonstrate that Ashville is independent of the Columbus Urbanized Area and therefore entitled to consideration as a first local service regardless of the location of its transmitter site. This would enable us to resolve the matter on the basis of a complete record and address any issue with respect to a two-step procedure to implement a migration of a station from a rural to an urbanized area.”

14. The same analysis applies in the instant case. Unless Jacobs is willing to bind itself not to complete its twelve year migration into Anniston as a condition to the allocation, a Tuck showing is mandatory. That showing must be accompanied by a persuasive rebuttal to the phalanx of evidence that WTDR-FM has identified with and, in a practical sense, already migrated to Anniston. Jacobs must, in other words, rebut the presumption that it is a rational broadcaster, who will inevitably put its tower where the most audience and revenues are -- in the Anniston Urbanized Area at the Anniston antenna farm.

III. The Proposed Allocation Is Short-Spaced And Waiver of Section 73.207 To Permit It Is Not Justified Under Existing Precedent Because WTDR-FM Will Move Its Transmitter Site.

15. As noted above, the Notice simple ignores that WTDR-FM is a grandfathered short-spaced station under Section 73.213 pursuant to 1989 changes to the rules designed to permit optimization of Class A facilities. This omission renders the Notice defective and avoids a key issue concerning the proposed allocation. As Mr. Mullaney points out, were the proposed Munford allocation to be made today without this background, it would not be allowed because it is short-spaced to Station WAFN(FM), Arab, Alabama. In addition, Mr. Mullaney avers that there is an adequately spaced site area for a 3 and a 6 KW WTDR-FM facility that could be

imposed on Jacobs if the Commission wishes effectively to protect the integrity of the FM Table. That area is SSW of Talladega -- not, of course, where Jacobs' journey toward Anniston is destined.

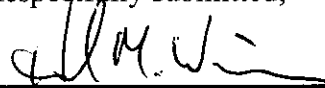
16. While it does not say so, Jacobs' Petition must be relying on a line of Commission precedents here which have waived Section 73.207 for 1964 and 1989 grandfathered short spacings, where the applicant proposes a subsequent community switch. See, e.g., Newnan and Peachtree City, Georgia, 7 FCC Rcd 6307 (1992); Killeen and Cedar Park, Texas, 13 FCC Rcd 18790 (1998); Fremont and Holton, Michigan, 14 FCC Rcd 17108 (1999); and Oceanside and Encinitas, California, 14 FCC Rcd 15302 (1999). But, in each of cases, the proposal at issue explicitly did not entail any modification of facilities. The rationale of these decisions was "since no change in technical facilities is contemplated, the potential for interference between the stations will not change", Newnan and Peachtree City, at ¶5. See also Fremont and Holton, supra, at ¶5 ("... [S]ince Station WSHN-FM is not changing its transmitter site and will continue to operate at three kilowatts or less, there will be no additional or new short spacing created by the change of community from Fremont to Holton.").

17. Likewise, Jacobs' engineer notes "that the grandfathered short spacing to WAFN remains unchanged with this proposal." (Petition at ¶4 of Technical Statement.) But, again, these carefully chosen words do nothing to contradict CC's central point: WTDR-FM will change its site as soon as the ink is dry on the Report and Order here. Since this move will be in a northerly direction toward WAFN there is a potential for increased interference. As with the Tuck issue, unless Jacobs is willing to promise that it will not move, the Newnan and Peachtree analogy is inapposite. Jacobs' "two-step" maneuver is being used not only to circumvent Section 1.420(i)'s conditions, but also to violate 73.207's prohibition of a short-spaced allotment.

IV. Conclusion

18. The question about community switch proponents intent to provide a local service raised here are not unique. But, CC submits that this case is unique with respect to how clearly Jacobs' own actions undermine the credibility of its claim that this is merely a community switch. Where a proponent has already received consent to move closer to a nearby Urbanized Area, and yet asserts it is not proposing a move in the community switch context, the Commission cannot reasonably accept the assertion. Accordingly, the Commission should condition this proposed allotment on a pledge that WTDR-FM will move no closer to Anniston, or, at the very least, demand a Tuck showing coupled with an explanation of WTDR-FM's intentions with respect to the construction permit and further migration toward Anniston. Moreover, the commission should refuse to expand the Newnan/Peachtree line of precedent to permit WTDR-FM to have a short-spaced allotment unless Jacobs will undertake not to move its site.

Respectfully submitted,



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March 29, 2004